Supreme Court, U. S.
FILED
FEB 19 1975
MICHAEL RODAK, JR., CLERK

No. 74-883

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

FEDERAL POWER COMMISSION,
Petitioner

v.

JOHN E. MOSS, *et al.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN PUBLIC GAS ASSOCIATION
CHARLES F. WHEATLEY, JR.
General Counsel
WILLIAM T. MILLER
STANLEY W. BALIS
1112 Watergate Office Building
2600 Virginia Avenue, N.W.
Washington, D. C. 20037

AMERICAN PUBLIC POWER ASSOCIATION
FRANK W. FRISK, JR.
Special Counsel
2600 Virginia Avenue, N.W.
Washington, D. C. 20037

CONSUMER FEDERATION OF AMERICA
JAMES L. FELDESMAN
1225 19th Street, N.W.
Washington, D. C. 20036

CITY OF CHICAGO, ILLINOIS
RICHARD L. CURRY
Corporation Counsel

BERNARD RANE
Assistant Corporation Counsel
511 City Hall
Chicago, Illinois 60602

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

INDEX

	Page
Reasons for Denying the Writ	2

CITATIONS

Cases:

FPC v. *Texaco*, —— U.S. ——, 41 L. Ed. 2d 141 (1974)	4
Michigan Consolidated Gas Co. v. *FPC*, 108 U.S. App. D.C. 409, 283 F.2d 204, *cert. denied*, 364 U.S. 913 (1960)	5
Sunray Mid-Continent Oil Co. v. *FPC*, 364 U.S. 137 (1960)	6
Sunray Mid-Continent Oil Co. v. *FPC*, 239 F.2d 97 (10th Cir. 1956), *reversed on other grounds*, 353 U.S. 944 (1957)	4, 6

Statutes and regulations:

Natural Gas Act, 52 Stat. 821, *et seq.*, as amended:	
Section 7, 15 U.S.C. § 717f	6
Section 7(b), 15 U.S.C. § 717f(b)	2-3, 5, 7
18 C.F.R. § 2.70	6, 7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-883

FEDERAL POWER COMMISSION,
Petitioner

v.

JOHN E. MOSS, *et al.*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The American Public Gas Association, American Public Power Association, Consumer Federation of America and City of Chicago, Illinois, joint petitioners before the United States Court of Appeals for the District of Columbia Circuit,[1] hereby file this brief in opposition to the petition of the Solicitor General on behalf of the Federal Power Commission ("FPC" or "Commission") for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit, and for the purposes of this brief in opposition, we adopt the introductory sections of the petition for a writ.

---

[1] Their joint petition for review was docketed at No. 72-1846 and consolidated with *Moss* v. *FPC* at Nos. 72-1837, *et al.*

REASONS FOR DENYING THE WRIT

1. The Federal Power Commission in Order Nos. 455 and 455-A amended its General Rules of Practice and Procedure by including "Section 2.75 Optional Procedure for Certificating New Producer Sales of Natural Gas," subsection (e) of which provides that the Commission will consider applications for permanent certification, "either with or without pregranted abandonment." As stated in Order No. 455, the goal of the optional procedure is to obtain long-term commitments of gas to the interstate market, and, accordingly, the Commission's "consideration of individual applications will reflect due concern for the desirability of long-term dedications." (App. D at 44a.)

Because the optional procedure was designed for long-term gas sales contracts and hence the period of time from the approval of pre-granted abandonment in the certificate proceeding until the termination of service at the conclusion of the contract term is of such length, the United States Court of Appeals for the District of Columbia Circuit concluded that in this context "pregranted abandonment requires more clairvoyance than even the Commission's expertise reasonably encompasses." (App. A at 21a.) Not only is this conclusion eminently reasonable and correct on its face but in addition it is further buttressed by the fact that the Commission has been unable to cite one example in its 37-year history where a long-term certificate has been granted with the allowance of pre-granted abandonment. For the Court of Appeals to have held otherwise would render meaningless Section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), which provides:

> "No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means

> of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment."

Although the Commission was forced to concede before the Court below that the first standard of Section 7(b), i.e., depleted supply, can only be proved at the end of the contract term, it asserts that a determination of "the present or future public convenience or necessity" can take place during the original certificate proceeding, as much as 20 years before the abandonment occurs. The fatal and rather obvious flaw in the Commission's argument is that it is based on an interpretation of "present" as meaning "today" instead of reading it in the context of Section 7(b) as a separate section of the Act calling for a separate hearing at the time when abandonment is contemplated at which time the producer must show either that its supply is depleted, or that the public convenience or necessity *at the time of* the proposed abandonment or thereafter, i.e., present or future, will be served by the granting of the abandonment petition.

Any other interpretation would make no sense and would preclude a future Commission at the expiration of the long-term contract from requiring any showing at that time by a producer of why the public interest would be served if service were abandoned. As the Court of Appeals noted, "abandonment [under Section 2.75(e)] will not be subject to future review but will be completely untrammeled." (App. A at 21a.)[1] The impact on today's

---

[1] Despite the Commission's protestations to the contrary (page 11 fn. 8 of its Petition), judicial review of the pre-granted abandonment issue at the time of certification will not make the abandonment any less untrammeled since, it is respectfully submitted,

interstate gas supply, which is already deficient, would be devastating if the Federal Power Commission had issued certificates with pre-granted abandonment in 1955 for the sale of a substantial quantity of gas under 20 year contracts. Today's Commission would be forced to sit idly by while consumers across the nation, who had grown dependent on this gas for the last 20 years, had their supplies suddenly and totally cut off since the producer would have to make no showing *at the time of abandonment* that the "present or future public convenience or necessity permit such abandonment." Congress obviously sought to avoid this untoward result through enactment of Section 7(b) of the Act.

The Commission's proposal to allow pre-granted abandonment in permanent certificates under Section 2.75(e) was therefore correctly struck down by the court of appeals since it ignores the teaching of *Sunray Mid-Continent Oil Company* v. *FPC*, 239 F.2d 97, 101 (10th Cir. 1956), *reversed on other grounds*, 353 U.S. 944 (1957), that:

> "No single factor in the Commission's duty to protect the public can be more important to the public than the continuity of the service furnished."

As this Court recently held in striking down an administrative attempt to deregulate certain gas producers:

> ". . . It is not the Court's role, however, to overturn congressional assumptions embedded into the framework of regulation established by the Act. This is a proper task for the legislature where the public interest may be considered from the multifaceted points of view of the representational process." [*Federal Power Commission* v. *Texaco*, —— U.S. ——, 41 L Ed 2d 141, 158 (1974).]

---

the reviewing court at the time of certification will suffer from the same lack of clairvoyance as the Commission concerning the public convenience or necessity some 20 years hence.

2. The Commission has premised its argument for retaining Section 2.75(e) on the assertion that:

> ". . . some producers are reluctant to sell their gas in interstate commerce for fear of making an indefinite commitment to that market. The availability of pre-granted abandonment makes it possible for the Commission to eliminate that fear, in appropriate cases and consistent with the public interest, by authorizing termination of the service on a date certain." [Petition at 11.]

Thus, it is clear that this Commission is willing to allow a producer at the end of the contract term to abandon the sale of gas to the interstate market simply because that producer would rather sell its gas in the unregulated, intrastate market, thereby eliminating the "fear of making an indefinite commitment" to the interstate market.

This is not only an inappropriate reason for approving pre-granted abandonment, but the desire to terminate interstate service in order to sell that same gas intrastate can never be an acceptable reason for granting abandonment, even in a Section 7(b) proceeding which takes place at the time the requested abandonment is to occur. Such was the holding of *Michigan Consolidated Gas Co.* v. *FPC*, 108 U.S. App. D.C. 409, 419, 283 F.2d 204, 214, *cert. denied*, 364 U.S. 913 (1960), wherein the D. C. Circuit, in an opinion joined in by Chief Justice (then Judge) Burger, declared:

> "If it wants to abandon service because it must now share that market, or *because it prefers to use that gas for more profitable unregulated sales*, or because it wants to be rid of what it considers a vexatious servitude, these are not reasons for granting its request." [Emphasis supplied.]

Furthermore, if a producer's desire to sell its gas at the conclusion of the interstate contract's term were

considered to be a valid reason for approving pre-granted abandonment, all of the producers which qualify for the optional certificate procedure may claim that they will not sell their gas in the interstate market at the present time unless their certificates provide for pre-granted abandonment. If this is permitted to occur,

> ". . . the way would be clear for every independent producer of natural gas to seek certification only for the limited period of its initial contract with the transmission company, and thus automatically be free at a future date, untrammeled by Commission regulation, to reassess whether it desired to continue serving the interstate market." [Sunray Mid-Continent Oil Co. v. FPC, 364 U.S. 137, 142 (1960).]

The result of allowing pre-granted abandonment to those producers whose long-term contracts are certificated under Section 2.75 would be to render the other powers of the Commission enumerated in Section 7 of the Natural Gas Act, 15 U.S.C. § 717f inoperative since, in the words of the 10th Circuit in *Sunray Mid-Continent Oil Co.* v. *FPC*, 239 F.2d 97, 101 (10th Cir. 1956), *reversed on other grounds*, 353 U.S. 944 (1957),

> "[e]ach of these powers is directly concerned, among other things, with providing the public adequate, reasonable, and continuous service. Each one of these powers would be a useless one if the natural gas companies could set, at the initiation of their public service, the date at which they would withdraw, abandon or cease their service."

3. The FPC's attempt to persuade this Court that it must review the Court of Appeals' decision because the lower Court's denial of pre-granted abandonment under the optional procedure may cast a shadow over the pre-granted abandonment feature of the Commission's limited-term certificates for short-term producer sales (18 CFR § 2.70) must be rejected because the Court of Appeals

did not comment upon Section 2.70, which was not before that Court for review, and, in its discussion of the lack of "clairvoyance" on the part of the Commission, the Court was obviously speaking in terms of certificates for contracts of long duration. (*See* App. A at 20a-21a.)

As noted *supra*, the Commission stated unequivocably in Order No. 455 that the purpose of the optional procedure is to attract long-term dedications of gas to the interstate market (*see* App. D at 44a), and the considerations of whether pre-granted abandonment is unlawful in this situation are not the same as those involved in determining the lawfulness of pre-granted abandonment in the context of short-term certificates. The Commission also seems to realize that this is a makeweight argument since it couches its assertion of the effect of the Court of Appeals' decision on limited-term certificates in such terms as "*arguably* affects" the validity of pre-granted abandonment in these short-term certificates and "*may*, in the Commission's judgment, deter" new dedications of gas under Section 2.70. (Petition at 12.) There is no evidence, much less assertion, that this is in fact the case.

CONCLUSION

The petition for a writ of certiorari should be denied. Section 2.75(e) contravenes the plain meaning and intent of Section 7(b) of the Act that the Commission determine the propriety of a proposed abandonment at the time of the proposed abandonment; the standard which the Commission seeks to apply in granting pre-granted abandonment, i.e., that the producer has demanded as a prerequisite for committing the gas to the interstate market that the sale be automatically terminated at the end of the contract term so that the producer will be free to sell the gas in the unregulated intrastate market, has already been found wanting by this Court

and the several courts of appeals to consider the matter; and finally the Commission's half-hearted attempt to make it appear that in striking down the pre-granted abandonment feature of the optional procedure, the Court of Appeals somehow affected short-term certificates, is without any basis in fact. In brief, there is no compelling reason for this Court to review the eminently correct conclusion of the United States Court of Appeals for the District of Columbia Circuit that Section 2.75(e) of the Federal Power Commission's Rules and Regulations is unlawful and must be set aside.

Respectfully submitted,

AMERICAN PUBLIC GAS ASSOCIATION

By _____

CHARLES F. WHEATLEY, JR.
General Counsel
WILLIAM T. MILLER
STANLEY W. BALIS
1112 Watergate Office Building
2600 Virginia Avenue, N.W.
Washington, D. C. 20037

AMERICAN PUBLIC POWER ASSOCIATION

By _____

FRANK W. FRISK, JR.
Special Counsel
2600 Virginia Avenue, N.W.
Washington, D. C. 20037

CONSUMER FEDERATION OF AMERICA

By _____

JAMES L. FELDESMAN
1225 19th Street, N.W.
Washington, D. C. 20036

CITY OF CHICAGO, ILLINOIS

By _____

RICHARD L. CURRY
Corporation Counsel
BERNARD RANE
Assistant Corporation Counsel
511 City Hall
Chicago, Illinois 60602

February 19, 1975